(18)

No. 96-643

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

THE STEEL COMPANY, a/k/a CHICAGO STEEL AND PICKLING COMPANY,
Petitioner,

v.

CITIZENS FOR A BETTER ENVIRONMENT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB, UNITED STATES PUBLIC INTEREST RESEARCH GROUP, FRIENDS OF THE EARTH, ATLANTIC STATES LEGAL FOUNDATION, TRIAL LAWYERS FOR PUBLIC JUSTICE AND OTHER MEMBERS OF AMICI (Additional Members Listed on Inside Cover) IN SUPPORT OF RESPONDENT

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Communities for a Better Environment
Cold Mountain, Cold Rivers, Inc.
Don't Waste Arizona, Citizens for Environmental Compliance
Ecological Consultants for the Public Interest

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Regulations:

Legislative Materials:

Other Authority:

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The primary purpose of the Emergency Planning and Community Right-to-Know Act (EPCRA) is to inform the public about releases of toxic chemicals by manufacturing facilities to the environment. EPCRA gives citizens a right to know what those chemicals are, where they are, and how much of them is present.

The thirteen organizations submitting this brief have a direct and substantial interest in this information and in enforcing EPCRA.[2] Their members live, breathe the air, and engage in recreational activities in areas affected by releases of toxic chemicals by companies regulated under EPCRA. These toxic chemicals are known to cause significant adverse effects on human

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[1]Letters confirming that petitioner and respondent consent to the filing of this brief have been filed with the Clerk of the Court. No counsel for any party had any role in authoring this brief, and no person other than the named *amici* and their counsel made any monetary contribution to its preparation or submission.

[2]The following not-for-profit organizations (with their state of incorporation and membership information in parentheses) join in this brief: Natural Resources Defense Council, Inc. (New York--more than 170,000 members nationwide), Sierra Club (California--more than 500,000 members nationwide), Friends of the Earth (New York--approximately 13,000 members nationwide), Atlantic States Legal Foundation (New York--thousands of members nationwide), Tennessee Environmental Council (Tennessee--over 1,100 individual members and 43 member organizations statewide), The Ecology Center of Ann Arbor, Inc. (Michigan--members throughout Michigan), Communities for a Better Environment (California--12,000 members statewide), Cold Mountain, Cold Rivers, Inc. (Montana--members throughout Montana and the United States), Don't Waste Arizona, Inc. (Arizona--approximately 5,000 members statewide), Citizens for Environmental Compliance (North Carolina--about 20 members statewide), United States Public Interest Research Group (Washington, D.C.--over 25,000 members nationwide). U.S. PIRG also acts as the national lobbying office for state PIRGs. Collectively, state PIRGs have over 1 million members nationwide. Ecological Consultants for the Public Interest is a national non-profit public interest consulting firm based in Boulder, Colorado that represents clients in a variety of enforcement and advocacy activities under EPCRA, including citizen suits. Trial Lawyers for Public Justice is a national public interest law firm based in Washington, D.C. and specializing in precedent-setting and socially significant tort, trial and environmental litigation. TLPJ's Environmental Enforcement Project uses citizen suits to enforce compliance with federal environmental laws, including EPCRA.

health and the environment. *Amicis'* members use data reported by facilities under EPCRA to learn about toxic chemical releases in their communities. The interests of *amicis'* members and their right to know about such releases is adversely affected whenever companies fail to file required and timely reports under EPCRA.

The thirteen organizations also have organizational interests in enforcing EPCRA. These *amici* research and use data reported by facilities under EPCRA. Based on these data, *amici* report to their members and the public about releases of toxic chemicals to the environment, advocate changes in environmental regulations and statutes, encourage companies to reduce their use of toxic chemicals, and seek to promote the effective enforcement of environmental regulations and statutes. *Amici* have also researched public files to identify companies which have failed to file required reports under EPCRA and have brought citizen suits against such companies.

Petitioner's interpretation of EPCRA would allow non-reporting companies to avoid all liability in citizen suits if they file the reports after receiving a citizen's notice letter and before the citizen files suit. Filing these reports is a simple act that can invariably be accomplished in a few days or weeks. Consequently, this interpretation would allow any EPCRA violator to delay compliance until it is notified of a citizen suit, and then to easily avoid any legal consequences for its violations.

This outcome would destroy the deterrent effect of civil enforcement, in two ways. First, it would discourage voluntary compliance and reward noncompliance by the regulated community. Second, it would mean that citizen investigations and enforcement efforts against violators are a waste of time and resources, because those violators would have a foolproof and simple defense in nearly every case. It is therefore critical that this Court affirm the decision below and reaffirm the right of citizens to sue for violations of EPCRA's reporting requirements.

SUMMARY OF ARGUMENT

The language and structure of EPCRA show that Congress intended to give citizens a cause of action to enforce reporting violations, without any temporal limitation. Congress defined citizen authority to sue in a functional sense. Under EPCRA, citizens can sue persons for "failure to complete and submit" required reporting forms. Unlike the Clean Water Act, EPCRA does not contain any word which ties the citizen's cause of action to the time that the citizen's complaint is filed. A failure to submit an EPCRA form will always be a past violation. Congress provided that EPCRA violators "shall be liable" for civil penalties for every day that such violations occur. Congress gave no indication in EPCRA that a violator's liability for civil penalties can be excused or negated by corrective action.

The scope of citizen enforcement should be determined solely on the basis of the statutory conditions enacted by Congress. This Court's general statements in *dicta* in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), concerning the role of citizen enforcement under the Clean Water Act should not be applied outside of that case and elevated above the specific language chosen by Congress in EPCRA.

CBE meets both the injury-in-fact and redressability requirements for standing. CBE's members in Chicago have informational, environmental and procedural interests which are harmed by The Steel Company's failure to disclose its releases of tons of extremely hazardous hydrochloric acid into Chicago's air. CBE's members' injuries will be redressed by an assessment of civil penalties, because Congress has found that those penalties will deter petitioner specifically and other companies generally from violating EPCRA. In addition, the potential relief includes pollution reduction projects that could directly benefit CBE's members.

Finally, permitting citizens to sue for past violations would not burden the federal courts with a flood of citizen suits, interfere with government enforcement activities, or contravene any constitutional requirements.

ARGUMENT

I. THE PLAIN LANGUAGE OF EPCRA AUTHORIZES CITIZENS TO SEEK CIVIL PENALTIES FOR A FAILURE TO FILE TIMELY REPORTS

It is fundamental that Congress decides "who may enforce [statutory rights] and in what manner." *Davis v. Passman*, 422 U.S. 228, 241 (1979). Congress defines the role of citizens in enforcing EPCRA. The nature of that role is set forth in the statutory text. It is therefore critical to examine the pertinent statutory language and apply traditional rules of statutory construction.

A citizen suit under EPCRA is a hybrid cause of action to vindicate a mixture of private and public rights. A citizen enforces EPCRA "on his own behalf." 42 U.S.C. § 11046(a). He therefore asserts his own private right to be free of harm from violations of EPCRA. In that sense, the citizen is a private litigant. However, the citizen also has remedial authority equivalent to that of the government, because he can seek to "enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." 42 U.S.C. § 11046(c). In that sense, the citizen is a private attorney general.

The scope of the citizen's cause of action as a private attorney general is defined in 42 U.S.C. § 11046(a)(1)(A), which lists four EPCRA requirements that citizens can enforce against owners or operators of facilities. The enforceability of these requirements is limited in only one respect. The first clause of 42 U.S.C. § 11046(a) authorizes citizen suits "[e]xcept as provided in subsection (e)." Subsection (e), in turn, is described in its heading as a single "[l]imitation," and provides that citizens cannot sue if EPA is already pursuing civil or administrative enforcement of the same violation. 42 U.S.C. § 11046(e). Thus, citizens can sue to enforce the four EPCRA requirements in 42 U.S.C. §

11046(a)(1)(A) whenever EPA does not.[3]

If the suit is one to enforce one of these four requirements, citizens have the same power to seek civil penalties that EPA does. EPCRA is quite clear on this. Under section 325 of EPCRA, EPA "may bring an action to assess and collect the penalty in the United States District Court" for a failure to submit the forms required by section 312 or 313. 42 U.S.C. § 11045(a)(1), (4). Similarly, under section 326, the district court in citizen suits "shall have jurisdiction * * * to impose *any* civil penalty provided for" a failure to submit those forms. 42 U.S.C. § 11046(c)(emphasis added). The penalty reference in the citizen suit provision in section 326 is to the federal government's civil penalty authority in section 325. Thus, for these types of violations, the penalty authority in EPA suits and citizen suits is coextensive.

The central issue in this case is whether Congress intended to limit citizen authority to seek civil penalties based on the timing of certain events relating to the violations of EPCRA. It is important to separate and define these events, place them in a common frame of reference, and then analyze how they relate to federal jurisdiction and the existence of a citizen cause of action. The timing of four events is relevant: the violation, penalty liability, cessation of the violation, and the filing of the complaint.

First, there is the timing of the violation itself. The violation in this case is the failure to submit required forms. For section 312, the form must be submitted annually on March 1. 42 U.S.C. § 11022(a)(2). For section 313, the form must be submitted annually on July 1. 42 U.S.C. § 11023(a). The violation occurs on the first day after the date on which the company was required to submit the required form. In this case, petitioner violated section 312 on March 2 of each year from 1988 through 1995, and violated section 313 on July 2 of each year from 1988 through 1995. Pet. App. A8; J.A. 7-10.

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[3]The legislative history supports this conclusion, indicating that EPCRA "allows citizens the right to sue in cases where the law is not enforced or the Government has not performed its mandated duties." 132 Cong. Rec. 29758 (1986)(Rep. Coats).

Second, there is the timing of penalty liability for those violations. Under section 325(c)(1), any person "who violates any requirement of section 312 or 313 shall be liable to the United States for a civil penalty." 42 U.S.C. § 11045(c)(1). In addition, Congress provided that "[e]ach day a violation * * * continues shall * * * constitute a separate violation," subject to a separate daily assessment of civil penalties. 42 U.S.C. § 11045(c)(3). This means that penalty liability first attaches on the date of each violation, and continues to attach on each subsequent day until the report is filed.[4] *See Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 890 F.2d 690, 696 (4th Cir. 1989).

Liability for penalties must begin with the happening of an event that occurred in the past. All violations of EPCRA, by necessity, will be "past" violations. A citizen cannot bring a citizen suit until the violations occur. The violations cannot occur until after the filing deadline passes, in the same sense that taxpayers cannot violate the filing deadline for their income tax forms until after April 15 of each year. In addition, civil penalties can only be imposed for "past" violations. A civil penalty cannot be imposed on violations before they occur.

Third, there is the time that the defendant ceases its violation. Nothing in EPCRA states that a defendant's cessation of a reporting violation absolves it of liability for civil penalties for that violation. EPCRA contains no defenses to liability.[5] It is a strict liability statute. If there is a violation, a penalty "shall" be imposed. 42 U.S.C. § 11045(c)(1). Consequently, an action for

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[4]Thus, if a required report is filed five days late, that constitutes five separate days of violation. Those violations do not lapse or disappear on the sixth day, when the belated report is filed.

[5]The 60-day notice requirement is not designed to give the violator an opportunity to cure its violation and avoid suit. Notice gives EPA an opportunity to exercise its primary enforcement authority, and gives the violator an opportunity to settle admitted violations or to head off misdirected litigation over disputed violations.

penalties is intrinsically incapable of being negated or rendered moot by a defendant's corrective action.[6] The only issue is how much the penalty should be, and that issue is within the district court's discretion to decide.

Fourth, there is the time that the citizen plaintiff files its complaint. This may occur before or after the defendant ceases its violations by filing its reporting form. If it is before the complaint is filed, or there is a risk of ongoing violations on or after that date, the violations are "ongoing." *Gwaltney*, 484 U.S. at 65. If it is after the complaint is filed, and there is no risk of ongoing violations thereafter, the violations are "wholly past." *Id.* at 56. The controversy in this case is about the jurisdictional and legal significance of that date under EPCRA.

To resolve this controversy, it is necessary to focus on the authorizing language that Congress used for citizen suits. A citizen plaintiff can file a complaint against an owner or operator of a facility "for failure to * * * complete and submit" a required reporting form "under" sections 312(a) or 313(a). 42 U.S.C. § 11046. There is no temporal limitation in this language. Indeed, the language has no temporal component at all. Instead, the

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[6]A defendant's voluntary cessation of its unlawful conduct will not cause mootness, "especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Four Circuits have held that, even if a defendant has cured its permit violations under the Clean Water Act since the citizen suit was filed, claims for civil penalties for past violations prevent the case from being moot. *NRDC v. Texaco Refining & Marketing, Inc.*, 2 F.3d 493, 502-504 (3d Cir. 1993); *Atlantic States Legal Foundation v. Pan American Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993); *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1135-37 (11th Cir. 1990); *Gwaltney*, 890 F.2d at 696. A contrary rule "would weaken the deterrent effect of the Act by diminishing incentives for citizens to sue and encourage dilatory tactics by defendants." *Texaco*, *supra*, 2 F.3d at 503-04. While these decisions focused on mootness by post-complaint compliance, the same reasoning applies to pre-complaint compliance. In both cases, allowing compliance to defeat a citizen suit would negate civil penalty authority and constrict the scope of citizen suits authorized by Congress. There is no principled basis for distinguishing between post-complaint and pre-complaint compliance as a defense to citizen suits for civil penalties.

language is purely functional--citizens can sue persons who violate these statutory sections by failing to submit the required forms.[7]

The phrase "failure to complete and submit" is synonymous with either "violates" or "violated." A person who fails to complete and submit the required form "violates" EPCRA. Similarly, a person who has failed to complete and submit the required form has "violated" EPCRA. Substituting either the present or past tense of the verb does not change the meaning of the statute. Congress did not use the English language in a temporal or historical sense. It used the English language in a functional sense.[8]

In this regard, the citizen suit provision in EPCRA is different from those in the Clean Water Act and the amended Clean Air Act. The CWA provision authorizes citizens to sue a person who "is *alleged* to be in violation" of that statute. 33 U.S.C. § 1365(a)(emphasis added). The CAA provision authorizes citizens to sue a person who "is *alleged* to have violated (if there is

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[7]Congress has frequently used the "failure to do" something in a functional sense as the basis for imposing penalties for past violations. *See, e.g.*, 26 U.S.C. § 6651 (imposing penalties for "failure to file" tax returns); 49 U.S.C. § 11901(i)(1) (imposing penalties for "failure to make, prepare, or preserve" a report to the Interstate Commerce Commission). Congress intended to allow the federal government to impose penalties for untimely reporting under those statutes. For example, under 26 U.S.C. § 6651, if a person fails to file a tax return, a penalty is imposed despite any attempt to file a late return. *Plunkett v. Commissioner*, 118 F.2d 644, 650 (1st Cir. 1941). Thus, these words are used in a functional, not a temporal, sense, and provide no basis for limiting the application of penalties to ongoing violations.

[8]This same functional usage is apparent in the federal enforcement section. The verbs describing the federal government's authority to file a civil action are stated in the present tense. 42 U.S.C. § 11045(c) (U.S. may sue "[a]ny person who violates" EPCRA or "who fails to furnish" required information under EPCRA). So are the verbs in the federal enforcement section of the Clean Water Act. 33 U.S.C. § 1319 (U.S. may sue any person who "is in violation" of the CWA). Yet "it is little questioned that the Administrator [of EPA] may bring enforcement actions to recover civil penalties for wholly past violations * * *." *Gwaltney*, 484 U.S. at 58.

evidence that the *alleged* violation has been repeated) or to be in violation of" that statute. 42 U.S.C. § 7604(a)(1)(emphases added). Both of these provisions use the word "alleged." That word must refer to the allegations in the plaintiff's complaint. In so doing, Congress created a temporal frame of reference based on the date that the complaint was filed. The timing of the violation (*i.e.*, whether it is wholly past or ongoing) and the right to sue are measured against that date.

In contrast, EPCRA does not contain the word "alleged" or any other similar term referring to the time that the complaint is filed. Instead, it contains a functional phrase which refers to the violation. As we have seen, an EPCRA violation "occurs" when the required form is not filed by the due date, and continues to occur on every day thereafter until it is filed. Consequently, a citizen suit may be filed whenever such a violation has occurred, subject only to prior government enforcement action and the applicable statute of limitations.[9]

The plain language and structure of EPCRA therefore authorize citizen suits for untimely reporting. Since "the intent of Congress is clear from the plain meaning of the statutory provision, that [is] the end of the judicial inquiry." *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984).

II. THE CITIZEN'S ROLE IN ENFORCING EPCRA IS DEFINED BY THE STATUTORY LANGUAGE, NOT BY THIS COURT'S STATEMENTS IN *GWALTNEY*

A major source of the error in petitioner's interpretation of EPCRA is its misapplication of this Court's *Gwaltney* decision. In that case, the Court addressed the issue of whether the citizen suit provision of the Clean Water Act authorizes citizen plaintiffs to file suit against violators of that Act who have "completely * * * eradicated" the potential for further violations. 484 U.S. at 70

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[9]The applicable statute of limitations for actions to enforce a penalty is five years. 28 U.S.C. § 2462. *Sierra Club v. Chevron U.S.A.*, 834 F.2d 1517, 1521 (9th Cir. 1987).

(Scalia, J., concurring). Focusing on the particular language and history of the Clean Water Act, this Court concluded that Congress had not intended such a result. In the course of this analysis, the Court noted that the Clean Water Act's disallowance of citizen suits when the government had already filed suit against the violator "suggests that the citizen suit is meant to supplement rather than supplant governmental action." *Id.* at 60. Further, the Court reasoned that limiting Clean Water Act citizen suits to "ongoing" violations could be seen as consistent with the "interstitial" role of such suits. *Id.* at 61. Following the lead of the Sixth Circuit in *Atlantic States Legal Foundation v. United Musical Instruments*, 61 F.3d 473, 477 (1995), petitioner seeks to use this language from *Gwaltney* to transform that opinion into a quasi-constitutional charter governing *all* federal citizen suit provisions, regardless of the particular language chosen by Congress.[10]

This approach is wrong-headed for two important reasons. First, it violates the basic principle that, as this Court stressed in *Gwaltney*, "the language of the statute itself" must be the focal point of analysis in determining Congressional intent. 484 U.S. at 56. The particular language and history of EPCRA, and not the statements of this Court in interpreting another statute, should determine whether respondent's suit can go forward. Allegiance to

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[10]Other courts have similarly read this language broadly to imply that citizens compete with government enforcers for the same public remedy and that any duplication between citizen and government enforcement is impermissible. The courts have quoted and relied on the "supplement or supplant" phrase in several decisions in which citizen suits were found to be barred by prior government enforcement action. *North and South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 555, 558 (1st Cir. 1991); *Arkansas Wildlife Federation v. ICI Americas Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376, 380 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1094 (1995). For a detailed analysis of why these cases are wrongly decided, *see* Hodas, *Enforcement of Environmental Law in a Triangular Federal System: Can Three Not Be a Crowd When Enforcement Authority is Shared by the United States, the States, and Their Citizens?*, 54 Maryland L. Rev. 1552, 1632-47 (1995); Hecket, *The Citizen's Role in Environmental Enforcement: Private Attorney General, Private Citizen, or Both*, 8 Natural Resources & Env't 31-34, 61-62 (Spring 1994).

the language of the statute is especially important here because, as discussed in Part I above, the language of EPCRA's citizen suit provision differs from its Clean Water Act counterpart in certain critical respects.

Second, this Court's statements in *Gwaltney* were merely a general description of the Congressional scheme under the CWA, not an invitation to rewrite the citizen suit provisions in all federal environmental laws. Unquestionably, citizen suits do "supplement," *i.e.*, "add to," agency enforcement. Citizens can supplement agency enforcement by commencing suits whenever the specific limitations on such suits do not apply. Furthermore, citizen suits cannot "supplant," *i.e.*, "supersede," agency enforcement. EPA always has the ultimate power to block or limit a citizen suit by taking judicial and administrative action.[11] In addition, by allowing citizens to seek penalties for "wholly past" violations of EPCRA only where EPA has not done so, Congress has preserved the subordinate ("interstitial") role of citizen suits, while at the same time emphasizing the important deterrent effect of penalty actions.[12]

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[11]EPA can completely block a citizen suit by filing a prior lawsuit or administrative action. 42 U.S.C. § 11046(e). EPA also has an absolute right to intervene in any citizen suit. *Id.*, § 11046(h). In addition, in analogous cases under the CWA, the courts have held that the filing of a citizen suit does not bar EPA from filing a subsequent judicial or administrative action involving the same violations. *U.S. v. Atlas Powder*, 26 Env't Rep. Cases (BNA) 1391, 1392 (E.D. Pa. 1987).

[12]In its discussion of the "interstitial" role of citizen suits under the Clean Water Act, the Court posited a hypothetical which assumed that EPA agreed in an administrative order "not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action * * * that it otherwise would not be obligated to take." 484 U.S. at 60-61. The Court then stated that, if citizens filed suit for the same past violations and could seek penalties that EPA chose to forgo, it would interfere with EPA's enforcement discretion. This hypothetical is inapplicable to EPCRA, since diligently prosecuted EPA administrative orders preclude a citizen action for the same violations. 42 U.S.C. § 11046(e). To the extent that this hypothetical suggests that an EPA decision not to enforce a violation at all is binding on citizens, that proposition "flies in the face of the clear language of the citizens' action provision

However, petitioner cannot use this Court's statements in *Gwaltney* as a basis for overriding Congress' decision to provide affected citizens with the right to seek penalties for past violations.[13]

In this case, the Seventh Circuit refused to "apply the holding of *Gwaltney* directly" to rewrite EPCRA in the manner that petitioner suggests, because "the first teaching of that case is to read a statute according to its most plain and natural meaning." 90 F.3d at 1242. Similarly, in *Wash PIRG v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (1993), the Ninth Circuit stated that the "supplement rather than supplant" language in *Gwaltney* "cannot persuade us to abandon the clear language that Congress used when

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of the CWA, as well as the legislative history, which make clear that agency inaction is precisely the circumstance in which private action is appropriate." *EPA v. City of Green Forest*, 921 F.2d 1394, 1405 (8th Cir. 1990), *cert. denied*, 502 U.S. 956 (1991).

[13]In the 1990 amendments to the Clean Air Act, Congress rejected the Dole-Nickles-Heflin amendment which would have applied the *Gwaltney* principle to citizen suits for civil penalties under that statute. 136 Cong. Rec. 6442 (1990). In the debates on that amendment, several Senators objected strongly to the *Gwaltney* decision. *See, e.g., id.* at 5277 (remarks of Sen. Lautenberg) (*Gwaltney* "undermine[s] the principle established by Congress in 1970--that the standards for which enforcement would be sought, either through administrative enforcement or citizen enforcement, are the same. Both EPA and citizens should have authority to sue for wholly past violations); *id.* at 5279 (remarks of Sen. Chaffee)(the Nickles amendment is "a very, very strange provision"); *id.* at 5286 (remarks of Sen. Durenberger)("[t]he Gwaltney problem can be fixed. It is not a defect in every environmental statute."); *id.* at 5354-55 (remarks of Sen. Baucus)("[t]here is no justification for allowing polluters to enjoy the unjust enrichment gained by failing to comply in the past even if they comply in the present"); *id.* at 5357-58 (remarks of Sen. Mitchell)("the outcome [in *Gwaltney*] is inappropriate because it provides no penalty to sources that have violated the act in the past"). On the House side, Rep. Collins stated that, "[i]n almost all of our laws across the country, a past violation is treated as a sufficient wrong to give rise to legal action. There is no reasonable justification for treating violations of the Clean Air Act differently." *Id.* at 11918.

it drafted the [CWA]."[14]

The courts which have relied on *Gwaltney* to limit citizen suits have given too little consideration to the statutory text that actually defines the citizens' cause of action. As *Gwaltney* recognized, the scope of citizen enforcement should be determined solely on the basis of the statutory conditions enacted by Congress. Viewed on that basis, Congress intended citizens to be able to sue for untimely EPCRA reports when EPA has not taken enforcement action.

III. CBE HAS STANDING TO SUE FOR PENALTIES FOR WHOLLY PAST VIOLATIONS

Petitioner also argues that a citizen plaintiff cannot satisfy the "injury-in-fact" and redressability requirements for Article III standing in a suit based solely on wholly past violations. Pet. Br. 34-41. However, petitioner is incorrect.

A. CBE Has Sufficiently Alleged Injury-in-Fact

CBE has alleged three types of "injury-in-fact" which satisfy Article III standards: informational, environmental, and procedural.

First, EPCRA protects CBE's informational interests. EPCRA creates a "right to know" about the nature and amount of toxic chemicals in citizens' communities. The statute provides that the required reporting forms "shall be available * * * to inform persons about releases of toxic chemicals to the environment * * *." 42 U.S.C. §. 11023(h). The Conference Report states that "[t]he information collected under this section is intended to inform the general public and the communities surrounding covered facilities about release of toxic chemicals, to assist research, to aid

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[14]*See also Citizens for a Better Environment v. Union Oil Co.*, 83 F.3d 1111, 1118 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 789 (1997); *Coalition for a Liveable West Side v. NYC Dept. of Environmental Protection*, 830 F. Supp. 194, 197 (S.D.N.Y. 1993).

in the development of regulations, guidelines and standards, and for other similar purposes." H. Rep. No. 962, 99th Cong., 2d Sess. 299 (1986). CBE's members live in the community near petitioner's facility and have been injured by the lack of information that resulted from petitioner's failure timely to file the reports required by the statute. J.A. 5. This informational injury continues after belated report is filed, because it can take months for EPA to update the publicly-accessible computerized data base that Congress required EPA to maintain. 42 U.S.C. § 11023(j).

It is well-established that informational injury, by itself, is a sufficient injury to confer standing. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982), the Court held that injury to the "statutorily created right to truthful housing information" was sufficient for constitutional purposes. The statute in *Havens* is an example of "statutes creating legal rights, the violation of which creates standing." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). EPCRA creates a similar right to know about the storage and release of toxic chemicals in one's community.[15]

Second, EPCRA protects CBE's members from environmental injury, both directly and indirectly. EPA has described the direct form of protection, in which government uses EPCRA information to protect the nearby community from chemical releases:

> EPCRA requires regulated sources to provide information on chemical production, storage and use to State Emergency Response Commissions (SERCs), Local Emergency Planning Committees (LEPCs) and Local Fire Departments (LFDs). This enables states and local communities to plan for and respond effectively to chemical accidents and inform potentially affected citizens of the risks posed by chemicals present in their communities, thereby enabling them to protect the environment or ecosystems which could be damaged by an accident. Failure to comply with EPCRA impairs the ability of states and local communities to meet their obligations and places emergency response personnel, the public and the environment at risk from a chemical release.

EPA, *Interim Revised Supplemental Environmental Projects Policy*, May 8, 1995, pp. 9-10.[16] CBE's members therefore face an increased risk of environmental harm from inadequate emergency preparedness when companies like The Steel Company fail to disclose information. The government and the community did not know that extremely hazardous chemicals were present at the facility, and could not plan for emergencies, spills, or releases of such chemicals. Untimely reporting may make emergencies more serious, and could result in injury or death to members of the community.

The risk of environmental harm in this case is serious. Petitioner failed to disclose that it was releasing as much as 14 tons per year of hydrochloric acid into Chicago's air. EPA has listed the aerosol form of hydrochloric acid as a "toxic chemical" under EPCRA. 40 C.F.R. § 372.65; 61 Fed. Reg. 38600, 38603 (July 25, 1996). Hydrochloric acid is "acutely toxic to all human tissue, producing effects ranging from irritation to corrosion to risk of early death." 60 Fed. Reg. 57382, 57384 (Nov. 15, 1995). EPA considers this chemical to be an "extremely hazardous substance" (EHS). *Id.* at 57385; 42 U.S.C. § 11004; 40 C.F.R. § 355.40; *id.*, Part 355, App. A. According to EPA, "EHSs are acutely toxic chemicals which cause both severe short- and long-term health effects after a single, brief exposure." 61 Fed. Reg. 20473, 20475 (May 7, 1996). EPA has also stated that "reporting of EHS

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[15]Courts have upheld the informational standing of plaintiffs to sue persons who have failed to report releases of toxic chemicals. *Atlantic States Legal Foundation v. Buffalo Envelope*, 823 F. Supp. 1065, 1067-72 (W.D.N.Y. 1993); *Delaware Valley Toxics Coalition v. Kurz-Hastings*, 813 F. Supp. 1132, 1138-41 (E.D. Pa. 1993); *Heart of America Northwest v. Westinghouse Hanford*, 820 F. Supp. 1265, 1271-73 (E.D. Wash. 1993).

[16]This policy is available on the World Wide Web at http://es.inel.gov/comply/oeca/policy.html.

releases is required because EHSs are acutely toxic and will potentially pose an immediate hazard upon release." *Id.* at 20476. Thus, EPCRA directly protects against this form of harm.

The indirect form of protection arises when the companies making the disclosures reduce their chemical usage. Congress believed that required disclosure, by itself, would encourage this result. Representative Sikorski made this point during the House debates on the conference version of the bill:

> Community Right-to-Know lifts the veil of ignorance which has created mistrust and antagonism between community members and local industry. Community Right-to-Know will guarantee open access to information, dispelling the atmosphere of mistrust and replacing it with one in which community members and industry can openly cooperate in addressing the problems of toxic waste. Safe companies will be rewarded by a community knowledgeable of their good record in handling hazardous products, *and unsafe companies will have a powerful incentive to clean up their act.*

132 Cong. Rec. 29747 (1986)(emphasis added). Congress drew a direct connection between compliance with EPCRA's disclosure requirements and reductions in pollution in nearby communities. Congress viewed the disclosure of information, by itself, as an inducement to companies to reduce their pollution. Thus, corporate secrecy encourages remedial inertia, while the spotlight of corporate disclosure encourages remedial action. Furthermore, this action can continue past the date that the form is filed. The filing of the form is just the beginning of the cooperative process that Congress envisioned to reduce pollution.[17]

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[17]Congress continued this same theme when it enlarged the scope of EPCRA reporting by enacting the Pollution Prevention Act of 1990. 42 U.S.C. §§ 13101, *et seq*. According to its main sponsor, Senator Lautenberg, that Act "is designed to foster efforts to eliminate or reduce pollution before it is generated." 136 Cong. Rec. S 17523 (daily ed., Oct. 27, 1990). One method to achieve that

In these two ways, petitioner's past EPRCA violations have caused environmental harm to CBE's members. In addition, petitioner's longstanding history of such violations creates a significant risk of future EPCRA violations and threatens to cause additional harm. This is a legally cognizable injury for standing purposes.

Third, CBE's members have suffered procedural injury. This Court stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992), that a plaintiff may have standing to challenge the failure to follow a procedural requirement if that requirement was "designed to protect some threatened concrete interest" of the plaintiff. *Id.* at 573 n.8. In the present case, the procedural injury arises from petitioner's failure to file required reports of its releases of toxic chemicals into the Chicago area. The reporting requirement was designed to protect the concrete informational and environmental interests of citizens, like CBE and its members, who live near pollution sources.

CBE therefore meets the "injury-in-fact" requirement for Article III standing. Its members have the same informational, environmental, and procedural injuries that the EPCRA regulatory system was designed by Congress to prevent.

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goal was a new requirement that industry disclose its pollution prevention efforts in its EPCRA reports. As Senator Lautenberg stated, "industry would be required to provide data on source reduction and recycling efforts as part of their reporting requirements under the Right-to-Know Program." *Id.* Thus, Congress expected that disclosure of that data would foster pollution reduction. That expectation has proven to be correct. In 1995, President Clinton stated that "[s]haring vital [Toxics Release Inventory] information with the public has provided a strong incentive for reduction in the generation, and, ultimately, release into the environment, of toxic chemicals." Exec. Order No. 12969, 60 Fed. Reg. 40989 (Aug. 10, 1995). Congress has therefore found that requiring disclosure of EPCRA information protects both the informational and environmental interests of residents in nearby communities.

B. CBE's Pursuit of Civil Penalties Deters Further Violations and Therefore Redresses Its Injuries

The third prong of standing analysis requires that CBE establish that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *U.S. v. Hays*, 115 S. Ct. 2431, 2435 (1995)(*quoting Defenders of Wildlife*, 504 U.S. at 561). To meet this requirement, then, CBE must show that it is likely to benefit from a decree in its favor.

At the outset, we note that, since CBE "has been accorded a procedural right to protect [its] concrete interests," it "can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7. In such cases, the primary focus of the standing inquiry is whether plaintiff has sued a defendant who has caused that injury. The Court suggested in *Defenders* that plaintiffs living near a site for a proposed federal dam would have procedural standing to sue if the licensing agency failed to prepare an EIS, even though the EIS might have no impact on the plans for the dam. *Id.* Similarly, CBE has standing to sue petitioner for its failure to submit EPCRA reports, even if the filing of those reports may not reduce the impact of releases of toxic chemicals in the community in which CBE's members live.

Even if this procedural injury alone were insufficient, CBE's pursuit of civil penalties satisfies redressability standards. Petitioner argues that CBE cannot benefit from this remedy, because all civil penalties will be paid to the U.S. Treasury. Pet. Br. 37-41. However, this is too narrow a characterization of the purpose and benefits of civil penalties. The purpose of such penalties is not to enrich the U.S. Treasury. A major purpose of penalties is to deter violations. *Tull v. U.S.*, 481 U.S. 412, 422-423 (1987). If citizens cannot seek civil penalties for past violations, the deterrent effect of citizen suits and penalties for violations of EPCRA in their communities will be eviscerated. As a result, citizens will be exposed to the risk of increased pollution.

The availability of civil penalties encourages citizens to bring citizen suits to remedy and deter violations. "Citizen

plaintiffs often initiate suit not to recover monetary awards for their own benefit, but rather to ensure that penalties are imposed so as to deter future violations." *Pan American Tanning Corp.*, 993 F.2d at 1021. Civil penalties also encourage defendants to reduce or eliminate their violations to limit or avoid their liability, which can be as high as $25,000 per day. 42 U.S.C. § 11045(c).

In the present case, these incentives caused CBE to file its notice letter and suit, and caused the Steel Company to file, belatedly, its EPCRA reports. If citizens can not seek civil penalties for past violations, they will be unable to recover the costs of identifying violators. As a result, citizens' incentive to investigate violators and file citizen suits will be greatly reduced. In addition, if violators could avoid civil penalties by complying after they receive notice of a citizen suit, they would have a greatly reduced incentive to comply promptly and voluntarily with their reporting obligations. Instead, they would have an incentive to delay their compliance. In effect, violators could avoid penalties at will. Then, when the noticed violations had become moot, violators could resume their noncompliance until they received another notice letter. As a result, citizen suits would have no real deterrent effect.

In the 1990 amendments to the Clean Air Act, several Senators recognized that the inability to sue for past violations would have exactly this type of devastating impact on deterrence.[18] The Senate considered the "Nickles-Heflin-Dole" amendment, No. 1456, which would have adopted *Gwaltney* and retained the existing language which authorized citizens to sue only those

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[18]In the 10 years since *Gwaltney* was decided, Congress has enacted only one comprehensive reauthorization of the major federal environmental statutes. In the 1990 reauthorization of the Clean Air Act, Congress rejected the *Gwaltney* principle that citizens should only be able to sue for ongoing violations. EPCRA was enacted in 1986, prior to *Gwaltney*. As a result, the legislative history of that statute contains no discussion of Congress' approach to that issue. Congress had no reason to address the *Gwaltney* issue in the Pollution Prevention Act of 1990, since EPCRA's citizen suit provision differed from the CWA provision construed in *Gwaltney* and no court had decided at that time that EPCRA's language prohibited citizen suits for wholly past violations.

persons "alleged to be in violation" of the Act. 136 Cong. Rec. 6437, 6557, 6564 (1990), § 609(a). In the debates on this amendment, Senator Chafee, one of the floor managers for the Senate bill, described the effect of this amendment:

> The second point is on the citizen suit, the citizen cannot collect for past damages. In other words, the citizen has to give notice, under the law--and we all agree with this--has to give notice to the polluter that he is giving suit and that gives the polluter 60 days to straighten out the situation. Under my colleague's [Sen. Nickles'] proposal he cannot go back and collect anything for past damage. He can only collect for future damage. I do not understand the rationale for that provision. What the polluter does, he says: "Oh, that is right. I will straighten it out." So he straightens it out. And since the citizen cannot collect for any past damages and the polluters stop, then there is no ground for a suit. He stops within the 60 days.
> Then what happens? The polluter starts polluting again, let us say somebody upstream, upwind. Then again the citizen has to go through this rigamarole, 60 days' notice; within the 60 days give notice. And the polluter says: "Oh, dear, I am sorry." We go through this charade possibly for several times.

Id. at 5627. The Senate rejected this proposed amendment and its language does not appear in the final enactment. *Id.* at 6442.

Thus, Congress wanted penalties to deter violators. Here, penalties deter petitioner from violating EPCRA in the future. Petitioner is under a continuing obligation to file EPCRA reports on a regular basis. It will deter the company specifically from evading that obligation if it knows that such evasions will be penalized.

Moreover, penalties will serve the general public interest in deterring other companies generally from failing to file required reports under EPCRA. Since CBE has asserted "distinct and palpable" harm to itself, it may also "invoke the general public

interest in support of [its] claim." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The imposition of penalties will deter other companies in the Chicago area and elsewhere from violating their EPCRA obligations in the future. Those companies will have a greater incentive to file reports quickly under EPCRA, instead of waiting to file, if they know they can be sued for past violations even if they file their reports before being sued. *SPIRG v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1200-01 (D.N.J. 1985).[19]

The deterrent effect of civil penalties is not speculative and has long been recognized by Congress. In numerous environmental statutes, Congress has drawn a direct connection between deterrence and civil penalties. In 1990, Congress amended the citizen suit provision of the Clean Air Act to authorize citizens to seek civil penalties. The Senate report on that provision stated that "[t]he assessment of civil penalties for violations of the Act is necessary for deterrence, restitution and retribution." S. Rep. No. 228, 101st Cong., 1st Sess. 373 (1989). Similarly, "[t]he legislative history of the [Clean Water] Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Tull*, 481

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[19]Recently, in *Bennett v. Spear*, 117 S. Ct. 1154 (1997), this Court found that the deterrent effect of civil penalties provided a sufficient prospect of remedial action to confer standing. The plaintiffs in that case challenged the adequacy of a biological opinion issued by the Fish and Wildlife Service (FWS) under the Endangered Species Act. Plaintiffs claimed that they were injured because restrictions on lake levels recommended in the FWS' opinion would cause federal agencies to reduce the amount of irrigation water available to them. This Court held that, although federal agencies were not bound to follow the opinion and reduce the water levels, they had a strong incentive to do so to avoid penalties for taking endangered species. According to the Court, the "powerful coercive effect" of the biological opinion on other federal agencies made it likely that plaintiffs' injury (*i.e.*, the threatened water level restrictions) would be redressed if the biological opinion were set aside. 117 S. Ct. at 1165. Similarly, the civil penalties imposed on EPCRA violators have a "powerful coercive effect" in stimulating compliance with EPCRA.

U.S. at 422-423.[20]

Congress has also viewed citizen suits which seek penalties as an important deterrent. During the 1985 debates on the CERCLA citizen suit provision, Senator Baucus stated that "citizen enforcement is currently operating as Congress intended: first, to provide a prod and second an alternative to government enforcement." 131 Cong. Rec. 24748 (1985). He also stated that "the scope and effectiveness of the publicity generated by recent citizen enforcement seems likely to act as a general deterrent." *Id.* at 24749. The Senate Report on the 1987 amendments to the Clean Water Act similarly stated that citizen suits "are a proven enforcement tool" that "have deterred violators and achieved significant compliance gains." S. Rep. No. 50, *supra*, p. 28. Congress has therefore decided that civil penalties are causally related to deterrence. With civil penalties in citizen suits, violators are more likely to comply with the law.

If this Court were to question or reject this finding by Congress on the effect of civil penalties and citizen enforcement, it would intrude on the separation of powers between the judicial and legislative branches. If this Court limited citizens' rights to seek civil penalties for past violations, it would be limiting the power of Congress to define, and protect against, certain kinds of injury. *See* Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 233 (1988). It is the "exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *TVA v. Hill*, 437 U.S. 153, 194 (1978). In addition, "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Cort v. Ash*, 422 U.S. 66, 84 (1975)(*quoting J.I. Case Co. v. Borak*, 377 U.S. 426, 433

[20]Congress amended the Clean Water Act in 1987 to give EPA administrative penalty authority because "issuance of an administrative order, without penalties, has not proven powerful enough to motivate violators or deter other similar violators." S. Rep. No. 50, 99th Cong., 1st Sess. 29 (1985). Congress expected that "this tool can be a strong force for achievement of quick compliance." *Id.*

(1964)). The purpose of penalties--deterring violators--would be seriously undermined if citizens could not sue for wholly past violations.

Furthermore, contrary to petitioner's argument (Pet. Br. 36), it is not true that the only form of redress for past violations is a payment of penalties to the U.S. Treasury. In assessing the issue of whether there is a sufficient prospect of remedial benefit to plaintiffs, the court should analyze the full range of remedial opportunities available through trial or settlement. This includes not only a judgment on the merits, but also a negotiated consent decree.

A consent decree may provide "broader relief than the court could have awarded after a trial." *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 525 (1986). The courts have held that, in settlements of citizen suits, the parties may agree in a consent decree to apply the money to environmental projects that address the harm caused by the violation.[21] The district courts in several EPCRA citizen suits have approved consent decrees in which payments were made to such projects. For example, in *Atlantic States Legal Foundation v. Whiting Roll-Up Door Mfg. Corp.*, 38 BNA Env't Rep. Cases 1426, 1428 (W.D.N.Y. 1994), the court approved a consent decree which required the violator to purchase emergency response equipment for local agencies and to conduct a five-year pollution prevention/toxics use reduction program.

Congress has specifically endorsed the use of payments for environmental projects in the settlement of enforcement actions under federal environmental statutes. The Conference Report on the 1987 amendments to the Clean Water Act stated:

> Settlements of this type preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental protection. * * * [T]he conferees encourage this procedure where appropriate.

[21]*PIRG v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 81 n.32 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *Sierra Club v. Electronic Controls Design*, 909 F.2d 1350, 1355-56 (9th Cir. 1990).

H. Rep. No. 1004, 99th Cong., 2d Sess. 139 (1986).

As petitioner admits (Pet. Br. 24), EPA has endorsed the use of "supplemental environmental projects (SEPs)" in settlement of EPCRA enforcement actions. In its SEP policy, EPA recognized the deterrent effect of these projects:

> The Agency encourages the use of SEPs. While penalties play an important role in environmental protection by deterring violations and creating a level playing field, SEPs can play an additional role in securing significant environmental or public health protection and improvements.[1]

[1] Depending on circumstances and cost, SEPs also may have a deterrent impact.

EPA, *Interim Revised Supplemental Environmental Projects Policy*, *supra*, p. 2. EPA has specifically approved of SEPs which prevent or reduce the generation of pollution and which restore and protect the environment. *Id.* at 6-7. EPA has also approved of SEPs which increase emergency planning and preparedness under EPCRA. *Id.* at 9-10. EPA itself has settled EPCRA cases in which millions of dollars are designated for SEPs rather than the U.S. Treasury. For example, in *U.S. v. Sherwin-Williams*, the consent decree provided that the company would pay $4.7 million in penalties and as much as $10 million on a cleanup program aimed at bringing its 123-acre Chicago facility into compliance with federal environmental statutes, including EPCRA. 27 BNA Env't Rep. (Current Developments) 2029 (Feb. 7, 1997); 62 Fed. Reg. 7473 (Feb. 19, 1997).

Petitioner will be deterred to the same extent regardless of whether it pays a certain amount to the U.S. Treasury or to an environmental project. In either instance, it has suffered the same financial disadvantage. In addition, environmental projects can directly benefit CBE's members by reducing the pollution in their community. When these projects are included in the redressability analysis, it is clear that CBE satisfies the redressability requirement

for Article III standing.

IV. PERMITTING CITIZEN SUITS FOR PAST VIOLATIONS WILL NOT HAVE THE ADVERSE EFFECTS ALLEGED BY PETITIONER AND ITS *AMICI*

Petitioner and its *amici* argue that permitting citizens to sue for past violations would have serious adverse effects, *i.e.*, burdening the federal courts with a flood of citizen suits, interfering with government enforcement activities, and raising serious constitutional issues under Article II. On the one hand, these arguments prove too much. All of them might support an argument that citizen plaintiffs should not be allowed to sue for penalties at all. However, Congress clearly rejected this argument by giving citizens the penalty remedy. On the other hand, these arguments prove too little. Not one of them supports petitioner's position that citizen suits for ongoing violations are authorized, but identical suits for past violations are not.

Petitioner claims that citizen suits for past EPCRA violations will burden the federal courts. Pet. Br. 13, 46. Petitioner speculates that, since some 870,000 facilities are subject to EPCRA, citizens will bring a "deluge" of citizen suits seeking huge penalties against these facilities based on past, stale violations which have already been corrected. *Id.* at 6-7, 47.

The short answer to this *in terrorem* argument is that citizens have little or no incentive to bring suit for these kinds of violations. The courts are unlikely to impose significant penalties in such suits, since they will look to the same statutory guidelines that EPA must apply in assessing administrative civil penalties. Section 325(b)(1)(C) provides that in determining those penalties, EPA "shall taken into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, * * * any prior history of such violations [and] the degree of culpability * * *." 42 U.S.C. § 11045(b)(1)(C). Furthermore, the district court can award reduced attorneys' fees or none at all if the citizen suit recovers only a nominal penalty. *Farrar v. Hobby*, 506 U.S. 103, 115 (1992); *Earth Island Institute v. Southern California Edison*,

838 F. Supp. 458, 466 (S.D. Cal. 1993).

Petitioner further argues that permitting citizens to sue for wholly past violations would "impermissibly intrude upon EPA's enforcement discretion." Pet. Br. 39. However, the United States rejected this argument in its *amicus* brief in the Seventh Circuit, stating that citizen enforcement "is critical to filling the gap between the number of significant environmental violations and the federal and state enforcement resources available to address such violations" and that dismissal of this case would "place additional burdens on EPA's enforcement resources." *Brief of the United States as Amicus Curiae*, pp. 2-3 (Feb. 28, 1996). Similarly, as we have shown above, Congress has repeatedly endorsed the use of citizen suits as a supplement to federal enforcement. In short, petitioner's argument has already been rejected by both Congress and the Executive Branch.

Furthermore, the Executive Branch's constitutional directive to "take Care" that the laws are faithfully executed is a duty, not an exclusive license. Art. II, § 3. If companies are violating the law, there is no interference with Executive prerogatives if a court issues a decision to that effect. Such a decision vindicates the law, and enforces it in a constitutionally authorized way.

Finally, petitioner and several supporting *amici* suggest that the Seventh Circuit's interpretation of EPCRA raises other constitutional problems under Article II. Pet. Br. 39; Brief of *Amicus Curiae* The Washington Legal Foundation 24-28. They argue that allowing citizens to sue for wholly past violations violates the separation of powers doctrine and the Appointments Clause by granting to private citizens powers that are vested exclusively in the Executive Branch. *Id.*

However, two federal district courts have found no constitutional infirmity with EPCRA's citizen suit provision on these grounds. *Buffalo Envelope*, 823 F. Supp. at 1072-76; *Kurz-Hastings*, 813 F. Supp. at 1138. In addition, at least five district courts have rejected similar constitutional challenges to the CWA's citizen suit provision. *Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc.*, 735 F. Supp. 1404, 1419-20 (N.D. Ind. 1990); *NRDC v. Outboard Marine Corp.*, 692 F. Supp.

801, 815 (N.D. Ill. 1988); *Sierra Club v. Port Townsend Paper Corp.*, 28 BNA Env't Rep. Cases 1676, 1678 (W.D. Wash. 1988); *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 623-25 (D. Md. 1987); *SPIRG v. Monsanto Co.*, 600 F. Supp. 1474, 1478 (D.N.J. 1985). This Court has invalidated statutes on Article II grounds only when Congress failed to "give the Executive Branch sufficient control over [enforcement] to ensure that the President is able to perform his constitutionally assigned duties" (*Morrison v. Olson*, 487 U.S. 654, 696 (1988)), attempted to retain control or supervision over the enforcement of the rights it created (*e.g.*, *INS v. Chadha*, 462 U.S. 919, 958 (1983)), or granted enforcement authority to persons not constitutionally authorized to exercise it (*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982)).

Citizen suits have none of these features. First, they do not deny or limit the Executive's power to enforce the law. On the contrary, that power is specifically preserved by the numerous government oversight mechanisms in the citizen suit provision--advance notification of citizen suits, preclusion of such suits by prior government enforcement action, and government intervention as of right. 42 U.S.C. § 11046.[22] Second, private litigants are not controlled by Congress. Third, Congress has the power "to determine * * * who may enforce [statutory rights] and in what manner." *Davis v. Passman*, 442 U.S. at 241. Congress can therefore constitutionally create a cause of action for a private

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[22]In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1941), this Court upheld the constitutionality of a *qui tam* statute which provided citizens with far broader prosecutorial discretion than does EPCRA. The False Claims Act, as then in force, entitled the *qui tam* plaintiff to prosecute frauds committed against the federal government and retain one-half of the penalty collected. Act of March 2, 1863, 12 Stat. 696, 698, 31 U.S.C. § 231-234 (1940). That statute did not provide for any of the government oversight mechanisms in EPCRA. It therefore follows *a fortiori* that EPCRA, which grants much more extensive protection to Executive Branch enforcement interests than did this *qui tam* statute, is constitutional.

citizen to sue "on his own behalf" (42 U.S.C. § 11046(a)) to remedy and prevent nondisclosure of the use and release of toxic chemicals in his community. In seeking penalties for such nondisclosure, citizens are vindicating their own rights. Congress can grant this remedy as a means of deterring violators and encouraging pollution prevention. The selection of particular remedies, like civil penalties, to effectuate policy "is a matter within the legislature's range of choice." *Tigner v. Texas*, 310 U.S. 141, 148 (1940).

CONCLUSION

For these reasons, the Seventh Circuit's decision should be affirmed.

Respectfully submitted,

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